Labor-Management Services Administration

## EMPLOYEE BENEFIT PLANS

### Proposed Class Exemptions From Prohibitions Respecting Certain Transactions in Which Multiemployer Plans are Involved

Notice is hereby given of proposals to exempt certain classes of transactions in which multiemployer plans (as defined in section 3(37) of the Employee Retirement Income Security Act of 1974 (the Act) and section 414(f) of the Internal Revenue Code of 1954 (the Code)) are involved from the restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c)(1) (A) through (D) of the Code, pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975) and Rev. Proc. 75-26, 1975-20 I.R.B. 14.

The Department of Labor (the Department) and the Internal Revenue Service (the Service) have been informed that multiemployer plans engage in numerous transactions which are established and customary in nature, widespread in usage, and reasonable in their terms, but which may be prohibited transactions within the meaning of sections 406 and 407(a) of the Act and section 4975(c)(1) of the Code.

There have been identified to the Department and the Service several classes of such transactions. Three of these classes of transactions are the subject of the proposed class exemptions described below.

It is asserted that class exemptions are necessary in the case of collectively bargained multiemployer plans because such plans frequently engage in operationally similar transactions having common characteristics which are distinctive for multiemployer plans generally, notwithstanding that a variety of industries with a multiplicity of parties and differing relationships are involved. It is also asserted that class exemptions are justifiable for classes of transactions engaged in by collectively bargained multiemployer plans because such plans are jointly administered within the meaning of section 302(c)(5) of the Labor-Management Relations Act of 1947 (29 U.S.C. 186(c)(5)).

The Department and the Service propose to grant the class exemptions described below. Each proposed class exemption, if granted as proposed or as modified, will be applicable to a particular transaction only if the transaction satisfies the conditions specified for the class in which it falls.

The Department and the Service are continuing to consider additional exemptions from the restrictions of sections 406 and 407(a) of the Act and taxes imposed by section 4975 of the Code with respect to other specific classes of transactions involving multiemployer plans which have been identified. The two agencies are prepared to consider promptly any applications which may hereafter be made to the agencies for such exemptions with respect to other classes of transactions involving multiemployer plans.

*General information.* The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption granted under section 408(a) of the Act and section 4975(c)(2) of the Code does not relieve a fiduciary with respect to a plan to which the exemption is applicable from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion in accordance with subsection (a)(1)(B) of section 404 of the Act, nor does it affect the requirement of section 401(a) of the Code that a plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) The proposed exemptions contained herein do not extend to transactions prohibited under section 406(b) of

the Act and section 4975(c)(1)(E) and (F) of the Code;

(3) Before an exemption may be granted under section 408(a) of the Act and section 4975(c)(2) of the Code, the Department and the Service must find that the exemption is administratively feasible, in the interest of the plan or plans and of their participants and beneficiaries, and protective of the rights of such participants and beneficiaries; and

(4) The exemptions proposed herein and which may be subsequently proposed as part of this proceeding would, if granted, be effective according to their terms notwithstanding anything to the contrary in sections 408(b), 414, and 2003(c)(2) of the Act and section 4975(d) of the Code.

All interested persons are invited to submit written comments on the proposal contained herein, on any particular exemption proposed herein, or on any particular aspect of this proposal. Such comments should be in the form of an original and five copies, and should be addressed to the Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, D.C. 20224 Attention: E:EP:T.

In order to receive consideration, such comments must be received by the Internal Revenue Service on or before June 30, 1975. All such comments will be open to public inspection at the Internal Revenue Service National Office Reading Room, 1111 Constitution Avenue, NW, Washington, D.C. 20224.

*Delinquent employer contributions.* An employer participating in a multiemployer plan (a "participating employer") is generally obligated under the terms of a collective bargaining agreement to make periodic contributions to a plan which is maintained pursuant to the terms of such collective bargaining agreement. Multiemployer plans are often confronted with the problem of delinquency in participating employer contributions, since such plans, by their very nature, have a multiplicity of participating employers of varying size and financial strength, and at times one or more participating employers may be delinquent in making such contributions. In the course of their collection efforts, multiemployer plans frequently delay or extend the time for payment of contributions pursuant to understandings, arrangements, or agreements in circumstances where it appears that collection of the full amount due the plan would be jeopardized were the plan to attempt to force immediate full payment. A question has been raised as to the extent to which such delinquencies, delays, or extentions may constitute prohibited transactions under sections 406 and 407(a) of the Act and section 4975(c)(1) of the Code.

The class exemption set forth in sections I and II below is proposed in order to eliminate the uncertainty that may exist in this area and the adverse effects to multiemployer plans and their participants and beneficiaries that may be caused by such uncertainty. The exemption sets forth conditions under which the payment of employer contributions to multiemployer plans may be delayed without the need to seek a specific exemption for each individual transaction. Any delays in the payment of such contributions or any arrangements for the payment of delinquent contributions which do not meet the conditions of the proposed class exemption may, nevertheless, be the subject of exemptions granted under appropriate conditions and safeguards on a case-by-case basis.

It should be noted that even if a transaction is not in violation of, or is exempt from, the prohibited transactions provisions, any failure to make a contribution may result in a failure to meet the minimum funding standards contained in part 3 of title I of the Act and, where relevant, section 412 of the Code. Nothing in this proposed exemption should be construed as a proposal to exempt participating employers from the funding requirements of the Act or the Code.

*Proposed exemption.* It is proposed that the following exemption be granted under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975) and Rev. Proc. 75-26, 1975-20 I.R.B. 14.

*Sec. I. Prospective.* Effective upon the granting of the exemption set forth in this section I, the restrictions of section 406(a) and section 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to the failure of a participating employer to make a contribution to a multiemployer plan, or to any agreement, arrangement or understanding between such employer and such a plan whereby the time is extended for the making of a contribution by such employer to such plan, if such failure, agreement, arrangement or understanding is—

(a) For a period ending no later than 60 days after the date that such contribution was originally due; or

(b) For a period ending no later than 24 months after the date such contribution was originally due, if within the period described in paragraph (a) the obligation of the employer to pay such contribution is, for that part of such period which extends beyond the period described in paragraph (a), evidenced by promissory notes or other written agreements between the employer and the plan which must provide for the following:

(1) Security for payment of such obligation, by collateral or third party guarantees of payment, which meets the standard of section 404(a)(1)(B) of the Act.

(2) Interest on the unpaid portion of the obligation, which meets the standard of section 404(a)(1)(B) of the Act, computed from the date the contribution was originally due.

(3) Maturity of the principal amount of the delinquent contribution and all interest thereon in full no more than 24 months after the original due date of such contribution, and installment payments of such principal and interest under a schedule no less favorable to the plan than equal quarterly installments, except that provision may be made for an extension of the due date for all or any part of any installment for a period not exceeding the shorter of 60 days or a period which ends 24 months from the original due date of the contribution.

*Sec. II. Retroactive.* Effective from January 1, 1975, to the effective date of the exemption under section I of this exemption, the restrictions of section 406 (a) and section 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c) (1) (A) through (D) of the Code, shall not apply to the failure of an employer to make a contribution to a multiemployer plan, or to any agreement, arrangement or understanding between an employer and such a plan whereby the time is extended for the making of a contribution by such employer to such plan, if such failure, agreement, arrangement or understanding—

(a) Is of a type similar in nature to those which ordinarily and customarily occurred or were entered into with respect to delinquent employer contributions to multiemployer plans before January 1, 1975; and

(b) Was not a prohibited transaction within the meaning of section 503(b) of the Internal Revenue Code of 1954 or the corresponding provisions of prior law.

*Construction loans.* Multiemployer plans covering employees in the building and construction trades have traditionally invested a percentage of their assets in construction loans in order to provide work opportunities for their participants. Generally, the decision to make a particular loan is made by a bank or insurance company which is responsible for making investment decisions for such plans.

The proposal under consideration herein would provide an exemption from the restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c) (1) (A) through (D) of the Code, to permit a multiemployer plan to make construction loans to employers contributing to the plan under conditions designed to safeguard the plan assets used to make such loans.

*Proposed exemption.* It is proposed that the following exemption be granted under the authority of section 408(a) of the Act and section 4975(c) (2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975) and Rev. Proc. 75–26, 1975–20 I.R.B. 14.

*Sec. I. Prospective.* Effective June 2, 1975, the restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c) (1) (A) through (D) of the Code, shall not apply to a loan made by a multiemployer plan to a participating employer, provided that—

(a) The loan is a construction loan;

(b) The decision to make the loan is made by a bank or insurance company which meets the requirements of section 3(38) of the Act, pursuant to its sole discretionary authority or control with respect to the management or disposition of the plan assets used to make such loan, subject only to broad investment guidelines, if any, established by the trustees of the plan;

(c) Neither the plan, the participating employer to whom the loan is made, nor the employee organization any of whose members are covered by the plan has the power to exercise a controlling influence over the management or policies of such bank or insurance company;

(d) The bank or insurance company commonly makes similar loans on similar terms and conditions from its own funds;

(e) Such loan satisfies the qualifications established by the bank or insurance company for making similar loans from its own funds;

(f) Before the loan is made, the participating employer to whom the loan is made and the plan have received a written commitment running to both such employer and the plan as construction lender for permanent financing from a person other than the plan to enable full repayment of such loan upon completion of construction;

(g) As a result of the making of such loan, (1) the aggregate amount of investments (including loans) of the plan in such participating employer does not exceed 10 percent of the fair market value of the assets of the plan and (2) the aggregate amount of investments of the plan in loans to all participating employers does not exceed 35 percent of the fair market value of the assets of the plan;

(h) The plan maintains or causes to be maintained a separate set of records setting forth the details of all such transactions; and

(i) Notwithstanding anything to the contrary in subsections (a) (2) and (b) of section 504 of the Act, the records referred to in paragraph (h) are unconditionally available for review during normal business hours by duly authorized representatives of (1) the Secretary of Labor, (2) the Commissioner of Internal Revenue, and (3) plan participants and beneficiaries.

*Sec. II. Retroactive.* Effective January 1, 1975, to June 2, 1975, the restrictions of section 406(a) and 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c) (1) (A) through (D) of the Code, shall not apply to a loan made by a multiemployer plan to a participating employer, *provided*, That—

(a) Such loan was made on or before June 2, 1975, or was made after such date pursuant to a written commitment to make such loan which was binding on the plan on such date;

(b) At the time such loan was made, it was not a prohibited transaction within the meaning of section 503(b) of the Code or the corresponding provisions of prior law; and

(c) Except for paragraphs (f) and (g), such loan met the requirements of section I of this exemption. The requirements of paragraphs (h) and (i) of section I of this exemption shall be deemed met if met on or before the 60th day after the date on which this exemption is granted.

*Sec. III. Definitions.* For purposes of sections I and II above—

(a) The term "sole discretionary authority or control" means that the bank or insurance company has sufficient authority or control with respect to such assets to enable it, without reporting to the plan, obtaining its approval or comments, or permitting it a veto, to entertain a proposal to make such loan, negotiate its terms, and make such loan. The fact that the bank or insurance company performs these functions under broad investment guidelines from the plan, which may include instructions to the bank generally to cause a part of the plan's assets to be invested in a certain class of loans, shall not prevent the bank or insurance company from being considered to have such "sole discretionary authority or control".

(b) An affiliate of any participating employer shall be treated as the same entity as such participating employer. For this purpose a corporation or partnership is an affiliate of an incorporated or unincorporated participating employer if it is a member of a controlled group which includes such participating employer; and a controlled group shall be defined in the same manner as the term "controlled group of corporations" is defined in section 1563(a) of the Internal Revenue Code of 1954, except that "50 percent" shall be substituted for "80 percent" wherever the latter percentage appears in such section, and except that in the case of a partnership, the term "corporation" shall be read as including a partnership, and the term "stock" shall be read as including a capital or profits interest in a partnership.

*Office space and administrative services.* Multiemployer plans frequently lease office space and furnish administrative services to parties in interest and disqualified persons (as defined in section 3(14) of the Act and section 4975(e) (2) of the Code), such as an employee organization the members of which are participants or beneficiaries of the plan (a "participating employee organization"), an employer contributing to the plan (a "participating employer"), or an association of such employers (a "participating employer association"). Transactions involving leases of office space and the furnishing of administrative services are also frequent between multiemployer plans maintained by common plan sponsors ("related multiemployer plans"); and multiemployer plans may by reason of section 3(14) of the Act and section 4975(e) (2) of the Code be parties in in-

terest or disqualified persons with respect to each other.

The proposal under consideration herein would provide an exemption from the restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, to permit a multiemployer plan to lease office space and to provide administrative services to certain parties in interest and disqualified persons under conditions designed to protect the interests of the plan and its participants and beneficiaries.

*Proposed exemption.* It is proposed that the following exemption be granted under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975) and Rev. Proc. 75-26, 1975-20, I.R.B. 14.

*Sec. I. Plans and participating parties—prospective.* Effective June 12, 1975, the restrictions of section 406(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to the leasing of office space or the provision of administrative services by a multiemployer plan to a participating employee organization, participating employer, or participating employer association, *provided,* That—

(a) The terms of the transaction are at least as favorable to the plan as an arm's length transaction with an unrelated party would be;

(b) The arrangement allows the plan to terminate without penalty the relationship on reasonably short notice under the circumstances;

(c) The plan maintains or causes to be maintained a separate set of records setting forth the details of all such transactions; and

(d) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (c) are unconditionally available for review during normal business hours by duly authorized representatives of (1) the Secretary of Labor, (2) the Commissioner of Internal Revenue, and (3) plan participants and beneficiaries.

*Sec. II. Plans and participating parties—retroactive.* Effective January 1, 1975, the restrictions of section 406(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of sections 4975(c)(1) (A) through (D) of the Code, shall not apply to the leasing of office space or the provision of administrative services by a multiemployer plan to a participating employee organization, participating employer, or participating employer association which occurred before June 12, 1975, or which occurred before October 1, 1975 pursuant to a binding arrangement entered into before June 2, 1975, *provided,* That such transaction was—

(a) Of a type that was ordinarily and customarily engaged in by multiemployer plans before January 1, 1975; and

(b) At the time it was entered into, not a prohibited transaction within the meaning of section 503(b) of the Code or the corresponding provisions of prior law.

*Sec. III. Plans and related plans—Prospective.* Effective June 12, 1975, the restrictions of section 406(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c)(1) (A) through (D) of the Code, space or the provision of administrative services by a multiemployer plan to related multiemployer plans, *provided,* That—

(a) The terms of the transaction are at least as favorable to each plan as an arm's-length transaction with an unrelated party would be, except that the terms need not provide for a profit which would otherwise have been received by the plan providing such office space or services had such transaction been made at arm's-length;

(b) The arrangement allows any related multiemployer plan which is a party to the transaction to terminate without penalty the relationship on a reasonably short notice under the circumstances;

(c) The plan which leases the office space or provides the services to the related multiemployer plan maintains or causes to be maintained a separate set of records setting forth the details of all such transactions; and

(d) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (c) are unconditionally available during normal business hours for review by duly authorized representatives of (1) the Secretary of Labor, (2) the Commissioner of Internal Revenue, and (3) plan participants and beneficiaries.

*Sec. IV. Plans and related plans—retroactive.* Effective January 1, 1975, the restrictions of sections 406(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c)(1) (A) through (D) of the Code, shall not apply to the leasing of office space or the provision of administrative services by a multiemployer plan to related multiemployer plans which occurred before June 12, 1975, or which occurred before October 1, 1975 pursuant to a binding arrangement entered into before June 2, 1975, *provided,* That such transaction was—

(a) Of a type that was ordinarily and customarily engaged in by multiemployer plans before January 1, 1975; and

(b) At the time it was entered into, not a prohibited transaction within the meaning of section 503(b) of the Code or the corresponding provisions of prior law.

For purposes of paragraph (b) of section IV only, a transaction shall not be deemed to be in violation of section 503 (b) of the Code or the corresponding provisions of prior law merely because the plan providing such office space or services does not receive a profit which would ordinarily have been received in an arm's-length transaction.

Signed at Washington, D.C., May 29, 1975.

DONALD C. ALEXANDER,
*Commissioner of Internal Revenue.*

JAMES D. HUTCHINSON,
*Acting Administrator of Pension and Welfare Benefit Programs, U.S. Department of Labor.*

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